Yellow Transportation, Inc. *and* Tony Laning. Case 17–CA–22549

September 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On July 19, 2004, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Yellow Transportation, Inc., Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging or otherwise discriminating against any of its employees because they engaged in protected concerted activity by filing grievances under the terms of the collective-bargaining agreement with the Union."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 29, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in protected concerted activity by filing grievances under the terms of the collective-bargaining agreement with Teamsters Local 41.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tony Laning full reinstatement to his former job as a casual equipment service attendant or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tony Laning whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent unlawfully discharged casual employee Tony Laning, we agree with the judge that Laning's discharge violated Sec. 8(a)(1) of the Act. We, therefore, find it unnecessary to pass on the judge's finding that the discharge also violated Sec. 8(a)(3), because this additional finding would be essentially cumulative with no material effect on the remedy. We shall modify the judge's Order accordingly.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tony Laning, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

YELLOW TRANSPORTATION, INC.

Michael Werner, Esq., for the General Counsel.
Brian N. Woolley, Esq., of Kansas City, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Overland Park, Kansas, on June 2, 2004. Tony Laning, an individual (the Charging Party or Laning), filed an original and an amended unfair labor practice charge in this case on December 31, 2003, and February 2, 2004, respectively. Based on that charge as amended, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint on March 29, 2004. The complaint alleges that Yellow Transportation, Inc. (the Respondent or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[1] I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a corporation, with an office and place of business in Kansas City, Missouri (the Respondent's facility), where it has been engaged in the interstate transportation of freight. Further, I find that during the 12-month period ending December 31, 2003, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 for the transportation of freight from the State of Missouri directly to points located outside the State of Missouri.

Accordingly, I conclude that the Respondent is now, and at all times material, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, Teamsters Local 41 (the Union)[2] has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The General Counsel alleges in the complaint that on December 19, 2003,[3] employee Tony Laning engaged in protected concerted activity by filing a grievance against the Respondent under the terms of the collective-bargaining agreement between the Union and the Respondent. Laning, who at the time was employed by the Respondent as an equipment service attendant on a casual basis, was claiming that the Respondent's failure to convert him to a position as a regular equipment service attendant constituted a violation of the contract. According to the General Counsel, the Respondent subsequently terminated Laning on December 19, because he filed this grievance. It is the position of the General Counsel that by discharging Laning because he exercised his right to file a grievance under the terms of the contract, the Respondent has violated both Section 8(a)(1) and 8(a)(3) of the Act.

According to the Respondent, Laning had no contractual right to file a grievance over the decision not to convert him to a position as a regular employee. Further, in its answer to the complaint, the Respondent contends that Laning was not terminated, but, rather, that the Respondent simply ceased to need his services. As a casual employee, Laning was utilized only when work was available, and if he was considered the best-qualified employee for that work. In the Respondent's view, Laning, as a casual employee, had no continued expectation of work. It is the position of the Respondent that the decision to cease using Laning was based solely on business considerations, specifically the diminished availability of work and the presence of better-qualified casuals. The Respondent denies that its decision to cease utilizing Laning was in any way related to his filing of a grievance, or to any protected activity.

B. The Facts

The events in question all occurred at the Respondent's Kansas City, Missouri maintenance shop. The Respondent employs employees represented by both the Teamsters and the Machinists in the shop, with a total work complement of approximately 70 employees. The employees represented by the Union are referred to as equipment service attendants. It is their responsibility to service and maintain the Respondent's fleet of trucks. Typically, they perform work that does not require significant mechanical ability, such as fueling trucks, and changing tires

[1] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[2] The current collective-bargaining agreement between the Employer and the Union indicates that the correct name of the Union is Local Union 41 International Brotherhood of Teamsters. GC Exh. 4.

[3] All dates are in 2003, unless otherwise indicated.

and oil. The Machinists perform the more difficult mechanical work. During the time period in question, there were approximately 34 "regular" and approximately 5 "casual" equipment service attendants. The regular employees are full-time workers, while the casuals are used as replacements when regular employees are unavailable due to vacation, illness, or an emergency. Casuals are not used to supplement the work force during busy periods. Regular employees are used for overtime. Both casual and regular equipment service attendants are included in the bargaining unit represented by the Union.

Kevin Anderson is the Respondent's manager of equipment services. As such, he is responsible for the work performed in the maintenance shop. The shop supervisors report directly to him. According to Anderson, the floor supervisor decides which casual employee to call for work to substitute for an absent regular employee. The decision is allegedly based on the supervisor's perception of which casual will be the best worker for the particular job required. Apparently the regular employees each specialize in a particular task, such as changing tires, and a casual substituting will be expected to perform the specific task of the absent regular employee. Anderson testified that seniority is not a factor that the floor supervisor must consider when deciding which casual to call for work.

The union shop steward at the Respondent's maintenance shop is Bill Kabus. He testified that there was no official seniority list for the casual employees. However, he alleged that unofficially, the Respondent's past practice as been to call casuals for work in the order of their longevity with the Respondent. He defined this as the casual employee's continuous service with the Employer. Further, he testified that when the Respondent decides to hire another regular employee, the past practice has been to hire that casual who has the longest continuous service. According to Kabus, "a major break in service" would mean that the casual employee's service employment date would start again.

Anderson testified that the Respondent did not utilize the seniority of casual employees as a priority for the hiring of a regular employee. Instead, the deciding factor was which casual had demonstrated the ability to be the best worker. Anderson allegedly made this decision, after consultation with the supervisors. In any event, both Kabus and Anderson agree that a casual employee who is not hired as a regular employee does not have the right to file a failure to hire grievance under the terms of the collective-bargaining agreement between the parties.[4]

Tony Laning testified that he began his employment with the Respondent as a casual employee in the maintenance shop in September 2000.[5] Laning noted that the same day he started his employment, his nephew also was hired as a casual.[6] In June or July 2001, Laning was fired.[7] However, he was reinstated as a casual only one day later. In September 2002, the Respondent hired Laning's nephew as a regular full-time employee. According to Laning, 2 or 3 days later he went to see Kevin Anderson. Laning asked Anderson "if there was any chance of [him] being hired." By this reference Laning meant being hired as a regular employee. He testified that Anderson responded, "You will be the next guy hired when the next guy retires." Further, according to Laning, Anderson gave him "[his] word." However, on March 3, 2003, while he was still a casual, the Respondent again fired Laning.[8] The Respondent rehired him as a casual employee in October 2003.

According to Laning, he went to see Anderson on November 17, 2003, because he had heard that the Respondent intended to hire one of two other casuals as a regular employee. Laning informed Anderson that he felt he should be the next casual hired, that he had worked hard for 2-1/2 years, and that Anderson had given his word that Laning would be hired next as a regular employee. Laning testified that Anderson denied promising to hire him as a regular employee, and said that even if he did, he would hire whomever he wanted to hire. During his testimony, Anderson did not dispute the substance of this conversation as recited by Laning. However, Anderson testified that he was upset with Laning's "demeanor." By this he apparently meant that Laning was allegedly demanding that he be hired next. According to Laning, he was not demanding a job, but only expressing his concern that another casual "was going to be hired in front of [him] again." In any event, the conversation obviously ended in an acrimonious atmosphere.

On December 19, Laning did not work. However, he went to the shop at approximately 2:30 p.m. for the specific purpose of filing a grievance. He spoke with A. C. Martin, the alternate steward, and asked for the regular steward, Bill Kabus. After being told that Kabus was not at work, Laning informed Martin that he wanted to file a grievance. Martin wanted to know what this was all about, and Laning told him that he felt it was unfair that the Respondent had hired another casual as a regular employee, rather than himself. Further, he complained to Martin that he felt his discharge in March 2003 had been unfair, and that it had disrupted his continuous service.[9] He told Martin that he felt this was a violation of the collective-bargaining agreement, and Laning gave Martin a written statement that he wanted Martin to file as a grievance. Martin testified that he tried to talk Laning out of filing a grievance, as it was his view that casuals had no right to file such a grievance. However, he was unsuccessful. Copying Laning's statement, Martin filled

[4] The collective-bargaining agreement between the parties is effective by its terms from June 1, 2003, through May 31, 2008. Art. 4, sec. 3(a) of the contract specifically states, "Casuals shall not have seniority status." GC Exh. 4.

[5] There is a cryptic, passing reference to earlier employment, but no direct testimonial or documentary evidence offered.

[6] Kevin Laning is Tony Laning's nephew.

[7] In a subsequent proceeding before the U.S. Equal Employment Opportunity Commission, Laning refers to this discharge as unlawful discrimination against him because of a vision problem. See R. Exh. 1.

[8] While the evidence is not entirely clear, it appears that Laning was fired on this occasion because under the Respondent's antinepotism policy, he could not be employed as a casual employee while his nephew was a regular full-time employee.

[9] Although the Respondent takes the position that casual seniority is not a factor considered when deciding to hire a regular employee, Kevin Anderson testified that because of the break in service caused by the March discharge, that several casual employees had more continuous service than did Laning.

out the grievance form, which he and Laning signed. Martin then presented the grievance to Anderson at about 3 p.m. (GC Exh. 2.)

As Laning was leaving the facility, he was called back by Anderson, who told him to get Martin and come to his office. As soon as the meeting began, Anderson informed Laning that casuals could not file grievances. Anderson asked Laning to explain the grievance to him, and Laning repeated what he had told Martin and what was contained on the grievance form. Further, Laning told Anderson that Anderson had given his word that Laning would be hired next, and mentioned that Supervisor Errol Smith had also made such a promise. Anderson then had Smith come to the meeting and informed of Laning's claim. Smith denied ever having told Laning that he would be hired next. According to Smith, it was Laning who had previously told Smith that he expected to be the next casual hired as a regular employee, because Anderson had allegedly made him such a promise.

Laning testified that toward the end of the conversation, Anderson informed him that, "[a]s of today, Tony, you're taken off the casual list. As of today, you're no longer allowed on Yellow freight's premises." Laning responded, "Okay, Kevin. I guess I'll see you in court." With that comment, the meeting ended. Anderson testified that the entire conversation lasted about 15 minutes. He does not dispute telling Laning that the Employer "would not be using him as a casual anymore," and receiving Laning's threat to see him in court.

Smith approached Laning as he was cleaning out his locker immediately following his discharge. According to Laning, Smith asked him, "Well, what I want to know Tony, is what did you do to get fired?" Laning testified that he responded that he was fired because he filed the grievance. Martin, who at the time was standing by the locker, testified that Smith wanted to know what was happening, because "he didn't know what was going on." When he testified, Smith did not deny making these remarks.

The Respondent denies that the decision to cease using Laning as a casual was based on his filing of a grievance. According to Anderson, he made the decision to cease using Laning 1 or 2 days prior to December 19. He testified that the Respondent was "going into the slow season right before Christmas." Allegedly, in an effort to reduce the number of casuals being utilized, Anderson decided to discontinue using Laning, because he "was the casual that was used the least." Another reason offered by Anderson to cease using Laning was his "constantly questioning why he got the days that he got, and why did other casuals get the days that they got versus him." Finally, Anderson mentioned the meeting he had with Laning in November, where Laning allegedly "insisted . . . almost demanded that he be the next person hired." According to Anderson, this incident "rubbed [him] very wrong also," and was another reason why he decided to cease using Laning. In any event, Anderson admitted that initially his decision was not communicated to anyone, that he did not write it down, and that it was only "in [his] mind."

Anderson testified that he first communicated to anyone his intention to no longer use Laning at about 11 a.m. on Friday, December 19. As was his habit, on Friday he reviewed the casual schedule for the following week. At that time he noticed that Laning was scheduled to work on December 26. Having allegedly decided to no longer use Laning, Anderson informed Supervisor Errol Smith of his decision. According to Anderson, after telling Smith of his decision, he directed Smith to call Laning and tell him that the Respondent would no longer be using him as a casual, and to cancel the work for the following week. The Respondent argues that as Laning had yet to file his grievance at this point, that Anderson's decision to cease using him could not possibly have been related to the grievance.

Errol Smith is a supervisor and the equipment manager in the Respondent's shop. He reports directly to Kevin Anderson. Smith testified that on December 19, sometime after 10 a.m., he called Laning to schedule him to work the following week. However, at about 1 p.m., he had a conversation with Anderson in which Anderson informed him that the Employer would no longer be using Laning. Anderson directed him to call Laning and tell Laning that he would no longer be used as a casual, and to cancel the work for the following week. According to Smith, he called Laning and told him that the work he had been assigned for the following week had been canceled. However, Smith did not mention anything to Laning about the Respondent ceasing to use him as a casual. Smith testified that "[he] felt that it wasn't [his] position to tell [Laning] that [Laning] wasn't going to be used anymore, and Mr. Anderson was the manager in charge, and [he] felt it was [Anderson's] duty to advise [Laning] of that information." In any event, it is clear from the testimony of both Smith and Laning that the first notice Laning received that he would no longer be used as a casual was when so informed by Smith in his office at about 3 p.m.

Union Steward Kabus testified that the Monday following Laning's termination of December 19, he had a conversation with Anderson about the termination. During the conversation, Anderson claimed that he had made the decision to cease using Laning prior to the time Laning filed his grievance. Anderson told Kabus that he had informed Errol Smith of his decision earlier on December 19. However, according to Kabus, Anderson never gave him any reason for no longer utilizing Laning. Kabus testified that since Laning was terminated, the Respondent has hired four casual employees to work in the service department. The Respondent did not dispute the hiring of new casuals following Laning's discharge, except to suggest in counsel's posthearing brief that the number hired was actually three, not four.

Pursuant to Laning's request, the Respondent sent him a letter dated February 4, 2004, in which a reason was given for the decision to cease using him as a casual employee. The letter, signed by Anderson, indicated that Anderson believed that fewer casual service attendants would be needed in the future. Further, he informed Laning in the letter that, "because you were normally the last casual to be called when work was available, your name was removed from the casual list." (GC Exh. 3.) As noted, Anderson took the position that Laning was the least utilized casual. However, in his testimony Laning disputed this, and no documentary evidence was offered to support Anderson's contention.

Anderson testified that at some time in the past, Steward Kabus had suggested to him that if the Respondent had no inten-

tion of hiring a casual as a regular employee, that the Respondent should cease using that casual, and "should cut him loose." Kabus did not deny making this statement. Further, Kabus testified that in the fall of 2003, he had a conversation with Anderson where they discussed the likelihood that the Respondent would be hiring another regular employee, to replace one who was retiring. According to Kabus, both he and Anderson suggested different casuals who might be selected, but neither man suggested Laning. Of course, the Respondent claims that this supports its contention that Laning was not a highly regarded casual.

Analysis and Conclusions

It is the position of counsel for the General Counsel that by insisting that the Union file a grievance in his behalf over the Respondent's failure to hire him as a regular employee, Laning was engaged in both union activity and protected concerted activity. I agree. The Union and the Employer were, during the time of the events in question, and continue to be, parties to a collective-bargaining agreement, which agreement contains a grievance procedure. (GC Exh. 4, art. 5, sec. 2, grievances.) Laning attempted to take advantage of that agreement, in order to remedy what he believed to be the injustice of the Respondent's decision to hire as a regular employee a casual other than himself. A grievance was in fact written, signed by Laning and the alternate steward, and presented to the Respondent. (GC Exh. 2.) While the Respondent and the Union apparently agree that Laning, as a casual, did not have the contractual right to file such a grievance, and despite perhaps citing the wrong contract provisions, Laning was still exercising his Section 7 right to engage in union and protected concerted activity.

In a recent decision, the Board affirmed an administrative law judge's finding that a respondent violated Section 8(a)(3) and (1) of the Act by discharging an employee in retaliation for the filing of a grievance. *LB & B Associates, Inc.*, 340 NLRB No. 29 (2003). The judge, citing *Prime Time Shuttle International*, 314 NLRB 838, 841 (1994), specifically found that filing a grievance is protected concerted activity within the meaning of the Act. Further, the judge held that a grievance filed in good faith is protected conduct even when the employee has no contractual right to file a grievance. *Regency Electronics*, 276 NLRB 4 fn. 3 (1985).

In the matter at hand, Laning is apparently of the belief that, were it not for his alleged unfair discharge in March 2003, he would have had the most seniority of any of the casual employees. Further, he contends that the Respondent's past practice has been to hire as a regular employee that casual having the longest continuous service with the Respondent. It is his opinion that the Respondent ignored its past practice when he was not selected to be the next regular employee hired. I am of the view that Laning held this opinion, wrong though it may have been, in good faith. It would seem, therefore, that when he filed the grievance in question, he did so on behalf of not only himself, but for any similarly situated casual employee.

The Board in *Regency Electronics*, supra, cited *Interboro Contractors*, 157 NLRB 1295 (1966), for the proposition that a complaint made by a single employee for the purpose of enforcing a collective-bargaining agreement is concerted activity protected by Section 7 of the Act irrespective of the merits of the complaint. Id. at 1298 fn. 7; in accord, *Jersey Power & Light Co.*, 269 NLRB 886, 888 (1984). The Supreme Court approved the Board's *Interboro* doctrine in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), stating that an employee's "honest and reasonable invocation" of a collective-bargaining contract is concerted activity "regardless of whether the employee turns out to have been correct in his belief that his right was violated." Id. at 1516. As indicated above, I conclude that Laning was of the belief that in failing to hire him as a regular employee, the Respondent was ignoring its past practice, and, therefore, was in violation of the contract. While his conclusion may have been in error, it does not detract from the reasonable and honest nature of his belief.

The case law strongly supports the proposition, and I find, that Laning was engaged in both protected concerted and union activity when he filed his grievance on December 19. However, the question, which still must be addressed, is whether the Respondent's decision to cease using Laning as a casual was motivated, at least in part, by his filing of the grievance.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's Wright Line test was approved by the United States Supreme Court in *NLRB vs. Transportation Corp.*, 462 U.S. 393 (1983).

The Board in *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

For the reasons stated earlier, I conclude that Laning was engaged in both protected concerted activity and union activity when he filed the grievance on December 19. Of course, there is no doubt that the Respondent was aware of that activity, as alternate Steward Martin presented the grievance directly to Manager Kevin Anderson, who immediately called Laning into

a meeting to discuss the grievance with him and Martin. Further, it is clear that during that meeting Laning suffered an adverse employment action. Anderson informed him that the Respondent was no longer going to utilize his services as a casual employee. This was the equivalent of being terminated. While the Respondent takes the position in its answer that Laning was not really discharged, since as a casual he had no expectation of continued employment, I find this argument rather disingenuous. Casual employee or not, Laning had in fact worked for the Respondent for significant periods of time from September 2000 until December 19, 2003. Certainly, being suddenly deprived of this employment was an adverse employment action, as it eliminated any future monies that Anderson might have received by virtue of his continued casual employment. Semantics aside, I conclude that the Respondent terminated Laning when Anderson precluded him from future casual employment.

The General Counsel having established the first three necessary elements of his case, there still remains the requirement that the General Counsel show a link, or nexus, between Laning's protected activity and the Respondent's decision to terminate him. *Tracker Marine,* supra. I believe that the evidence does establish such a connection. Certainly, the timing of Anderson's notice to Laning is highly suspect. Laning first learned that he would no longer be used as a casual when so informed by Anderson while they were discussing his grievance on December 19. While Anderson alleges that he actually made this decision a day or two earlier, I do not believe him. There is no credible evidence to support his contention. He made no notes, took no action of any kind, and at the time told no one of his alleged decision. The first person to whom he allegedly communicated this decision was Errol Smith, but only on the morning of December 19.

I did not find Kevin Anderson to be a credible witness. Observing his demeanor, he appeared to me to be visibly upset when testifying about Laning's filing of the grievance, despite the passage of 6 months time. While he denied that the filing of the grievance was at all unusual,[10] or that it adversely affected him, his mannerisms conveyed the opposite impression. He seemed tense, defensive, and on edge.

Also, Anderson's testimony was inherently implausible. Had Anderson actually instructed Smith to inform Laning that the Respondent would no longer be using him, Anderson himself would not have had to break the news to Laning at the grievance meeting. He would not have needed to do so, believing that Smith had already conveyed the news.[11] It is logical, therefore, to assume that Anderson gave Laning the news that he was terminated, because he made the decision on the spot, immediately following the filing of the grievance.

Further, Errol Smith's testimony only partially supported Anderson. Smith testified that Anderson told him in the early afternoon of December 19 that Laning would no longer be used by the Respondent, and directed Smith to so inform Laning. While Smith called Laning, he acknowledges that he said nothing to Laning about an alleged decision to cease using him as a casual, merely canceling the scheduled work for the following week. Clearly, in having to testify, Smith was in a difficult position. As a direct subordinate of Anderson, Smith would likely have been under considerable pressure to corroborate the testimony of his boss. In an effort to do so, I believe that Smith testified untruthfully that Anderson spoke to him on December 19 about ceasing to use Laning as a casual. However, to his credit, Smith was not willing to further lie, and testified accurately that during his telephone conversation with Laning, he conveyed nothing about the alleged decision.

I am of the view that Laning testified credibly. He seemed sincere, and his testimony was clear, certain, and without ambiguity. It had "the ring of authenticity" to it. Further, it was inherently plausible. He acknowledged getting a call from Smith on December 19, canceling the work that he had been scheduled for the following week, because the regular employee he was to replace had decided not to take the time off. According to Laning, Smith ended the conversation by saying, "If I get anything else, I'll give you a call." In my opinion, this is simply not the parting comment of a man who allegedly knows that the Respondent will not be using Laning as a casual in the future. Also, Laning and Martin credibly testified that following the termination, Smith approached Laning at his locker and asked him why he had been terminated, or words to that effect. Smith, who did not deny asking this question, certainly seemed unaware of exactly what had transpired. Such would only be the case if Smith, contrary to his testimony, had not been informed of Laning's termination prior to the time of the grievance meeting.

As I have indicated, I believe that Smith's testimony was untrue, and that he was merely trying to support Anderson's claim that a decision to cease using Laning had already been made by the time Laning filed his grievance. To the contrary, I conclude that no such decision was made until after Laning filed the grievance. Thus, the timing of Anderson's decision strongly suggests that he made his decision precisely because he was very upset with Laning for filing the grievance.

The Board has held that the timing of a discharge can support an inference of antiunion motivation. In *Sawyer of Napa*, 300 NLRB 131, 150 (1990), the administrative law judge, who was affirmed by the Board, concluded that "a coincidence in time between Respondent's knowledge of [the two discriminatees'] union sympathies and activities and their discharges is strong evidence of an unlawful motive for their discharges." The judge cited *NLRB v. Raine Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision); *NLRB v. Windsor Industries*, 730 F.2d 860, 864 (2d Cir. 1984); and *Dayton Typographic Service*, 778 F.2d 1188, 1193 (6th Cir. 1985). Accord: *Wal-Mart Stores*, 341 NLRB 111, slip op. at 10 (2004); *Electronic Data Systems Corp.*, 305 NLRB 219, 219–220 (1991).

Animus or hostility toward an employee's protected concerted activity or union activity may be inferred from all the circumstances, even without direct evidence. See *Shattuck*

[10] According to Anderson, an average of 20 to 30 grievances are filed in the shop every year.

[11] While Smith testified that, in fact, he did not inform Laning that the Respondent would no longer use him, Smith did not testify that he told Anderson that his alleged order had not been carried out. The Respondent offered no evidence to establish that Anderson had any reason to know that Smith had disregarded his alleged order.

Denn Mining Corp., v. NLRB, 362 F.2d 466 (9th Cir. 1966); and *U.S. Soil Conditioning Co.,* 325 NLRB 762 (1978). Anderson's almost immediate reaction to the filing of the grievance was to inform Laning that as a casual employee he did not have the right to file a grievance, and, further, that the Respondent would no longer be using him in any capacity. This sequence of events certainly demonstrates that Anderson harbored animus toward Laning because of his protected activity in filing the grievance.

I do not accept Anderson's claim that the filing of the grievance was a nonevent, because of the frequency with which grievances were filed in the shop. It appears that in Anderson's mind this grievance was different, as he immediately called Laning into his office to inform him that as a casual employee he had no contractual right to file the grievance. The filing of this specific grievance seemed to, for whatever reason, particularly upset Anderson. In explaining why he decided to cease using Laning, one reason offered by Anderson was Laning's alleged habit of "constantly questioning" management's decisions. I can only assume that in Anderson's mind the filing of the grievance was a continuation of Laning's practice of questioning management. Anderson was apparently further infuriated by what he considered to be the merit less nature of the grievance.

In any event, regardless of why Laning's grievance so upset Anderson, the credible evidence establishes that Anderson decided to cease using Laning as a casual specifically because he filed the grievance. As the filing of the grievance constituted both protected concerted and union activity, the General Counsel has met his burden of establishing that the Respondent's action in discharging Laning from his position as a casual employee was motivated, at least in part, by animus toward that protected conduct.

The burden now shifts to the Respondent to show that it would have taken the same action, absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc*., 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has failed to meet this burden.

It was the Respondent's position, as stated in Anderson's letter to Laning dated February 4, 2003, that it ceased using Laning as a casual employee because fewer casual service attendants were going to be used, and Laning was the last casual called when work was available. (GC Exh. 3.) However, as noted earlier, the unrebutted evidence established that at the time of the hearing, at least three, and possibly four, additional casuals had been hired since Laning's termination. This evidence disproves the Respondent's contention that business considerations required the use of fewer casuals. Further, the Respondent offered no documentary or testimonial evidence to support Anderson's assertion that Laning was the least used casual.[12] Laning denied this assertion, and, for the reasons that I have previously noted, I credit his testimony, rather than that of Anderson.

Almost as an after thought, Anderson testified that he decided to cease using Laning as a casual because Laning was "constantly questioning" management's decisions, and because in November Laning had allegedly "almost demanded" to be the next regular employee hired. Laning credibly denied making any such "demand," testifying that he merely expressed his "concern" to Anderson about some other casual being hired for the next available regular position.

Regarding the contention that Laning was constantly questioning management, I have no doubt that this thought went through Anderson's mind on December 19 when he viewed Laning's grievance for the first time. In fact, questioning whether management has violated the collective-bargaining agreement is the essence of a grievance. It does not matter whether Laning's grievance had merit or not. He had the right under Section 7 of the Act to attempt to file the grievance, and in so doing question management's decision not to hire him as a regular employee. For all practical purposes, Anderson has admitted that it was this very "questioning" which he resented, and which contributed to his decision to terminate Laning.

I find the Respondent's stated explanation for terminating Laning to constitute a pretext. Accordingly, the Respondent has failed to rebut the General Counsel's *prima facie* case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of Laning's protected concerted and union activity. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Shattuck Denn Mining Corp. v. NLRB*, 326 F.2d 466, 470 (9th Cir. 1966).

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(1) of the Act by discharging Tony Laning because he engaged in protected concerted activity, as alleged in paragraph 6 of the complaint. As the Respondent's conduct had the natural effect of discouraging its employees from utilizing the contract grievance procedure, a Section 7 right, it constitutes an independent violation of Section 8(a)(1) of the Act. Further, I find and conclude that the Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Laning because he engaged in union activity, as alleged in paragraph 7 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Yellow Transportation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local 41, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

Discharging its casual employee Tony Laning on December 19, 2003.

[12] Presumably, the Respondent had business records in its possession that would establish both the extent of its continuing need for and use of casual employees, as well as the hours worked by Laning in comparison with the other casuals. As the Respondent offered no such records into evidence in support of its position, I draw an adverse inference that its reason for discharging Laning was other than economic. See M*iramar Hotel Corp*., 336 NLRB 1203, 1215 (2001).

4. By the following acts and conduct the Respondent has violated Section 8(3) and (1) of the Act:

Discharging its casual employee Tony Laning on December 19, 2003.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[13]

The Respondent having discriminatorily discharged its casual employee Tony Laning, my recommended order requires the Respondent to offer him immediate reinstatement to his former position as a casual equipment service attendant, displacing if necessary any replacement, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges. My recommended order further requires the Respondent to make Laning whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date the Respondent makes a proper offer of reinstatement to him, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Laning, and to provide him with written notice of such expunction, and inform him that the unlawful conduct will not be used as a basis for further personnel actions against him. *Sterling Sugars, Inc*., 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Laning in any other way.

Finally, the Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Yellow Transportation, Inc., Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees because they engaged in union activity or protected concerted activity by filing grievances under the terms of the collective-bargaining agreement with the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Tony Laning full reinstatement to his former job as a casual equipment service attendant or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Tony Laning whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Tony Laning, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Kansas City, Missouri, copies of the attached notice marked "Appendix."[15] Copies of the Notice, on forms provided by the Regional Director for Region 17after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Kansas City, Missouri maintenance shop at any time since December 19, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at San Francisco, California on July 19, 2004.

APPENDIX

NOTICE TO EMPLOYEES

[13] In its answer to the complaint, the Respondent raises eight "Affirmative Defenses." While the Respondent proffered no evidence at the hearing to support these defenses, they all relate to the issue of backpay and reinstatement for Laning. As such, the appropriate forum at which to offer evidence in support of these defenses is at a compliance proceeding.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in union activity or protected concerted activity by filing grievances under the terms of the collective-bargaining agreement with Teamsters Local 41.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Tony Laning full reinstatement to his former job as a casual equipment service attendant or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tony Laning whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tony Laning, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

YELLOW TRANSPORTATION, INC.